

# SECTION I.

## Introduction

This report provides information to assist the Idaho Transportation Department (ITD) in determining how it will implement the Federal Disadvantaged Business Enterprise (DBE) Program related to USDOT-funded transportation contracts.

### Study Scope

The Disparity Study examines the transportation construction and engineering industry in Idaho and related contracts awarded by ITD.

The Study focuses on FHWA- and state-funded contracts; however, Section IX of this report also discusses implementation of the DBE Program for FTA- and FAA-funded contracts. The analysis includes firms receiving prime contracts and subcontracts as well as suppliers and truckers. The study team examined contracts in each ITD district. (Figure I-1 on the following page identifies ITD districts and also divides the state into Northern Idaho and Southern Idaho, which is important for BBC's disparity analysis by region.)

ITD awards and administers certain federally-funded contracts for cities, counties or other local agencies. These contracts are included in the data reviewed by BBC.

### Federal DBE Program

After enactment of the Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21) in 1998, the U.S. Department of Transportation (USDOT) established a new Federal DBE Program.

**Program elements.** The elements of the Program are set forth in 49 CFR Part 26. Race- and gender-conscious measures such as DBE contract goals may be used if necessary, but are not required in a state's implementation of the Federal DBE Program. Until January 2006, ITD had used DBE contract goals for federally-funded construction contracts and some professional services contracts. In response to new guidance from the courts and from USDOT, ITD changed its implementation of the program to no longer require meeting DBE contract goals or showing good faith efforts to do so. ITD made this change for contracts advertised after January 10, 2006.

**Race/ethnic/gender groups.** Disadvantaged business enterprises (DBEs) are defined in the Federal DBE Program (49 CFR Section 26.5). A DBE is a small business owned and controlled by one or more individuals who are socially and economically disadvantaged, as explained in Appendix A (Definitions). The Federal DBE Program specifies the race, ethnic and gender groups that can be presumed to be disadvantaged. These groups are:

- Black Americans  
(or "African Americans" in this study);
- Hispanic Americans;
- Native Americans;
- Asian-Pacific Americans;
- Subcontinent Asian Americans; and
- Women of any race or ethnicity.

There is a gross revenue limit (not more than \$20,410,000 and lower limits for certain lines of business) and a personal net worth limit (\$750,000, not including equity in the business and in personal residence) that firms and firm owners must fall below to be able to be certified as a DBE (49 CFR Subpart D). In this study:

- “DBEs” refers to disadvantaged business enterprises according to the federal definitions in 49 CFR Part 26 that have been certified as such.
- “MBEs” and “WBEs” refer to firms owned and controlled by minorities or women, according to the race/ethnicity definitions listed above, whether or not they are certified.
- When considering an overall annual goal, BBC also considers existing minority- and women-owned firms that could potentially be certified as DBEs given BBC’s information about the size of these firms.

Appendix A examines additional key terms and their definitions for this study.

**Figure I-1.**  
**ITD districts**  
**and regions**



## Legal Requirements for ITD Implementation of the Federal DBE Program

The new Federal DBE Program that the federal government developed in 1999 responded to the 1995 U.S. Supreme Court decision in *Adarand Constructors, Inc. v. Peña*.<sup>1</sup> The Court held that a federal program utilizing a racial classification is only constitutional if it serves a “compelling interest” and is “narrowly tailored” to achieve that objective. “Narrow tailoring” has a number of components, which are discussed in Appendix B.

**Difference between implementing a federal program and a state or local program.** In *Adarand*, the U.S. Supreme Court extended the same standard for review of federal programs that the Court had earlier applied to state and local governments in *City of Richmond v. J.A. Croson*.<sup>2</sup> After the 1989 *Croson* decision, many state and local minority- and women-owned business enterprise programs (non-federal programs) were held to be unconstitutional by the courts.

Appendix B (Legal Environment for ITD DBE Program) summarizes certain key federal court decisions affecting race- and gender-conscious programs implemented by public agencies, including the implementation by state transportation departments of the Federal DBE Program.

**Requirements for implementing the Federal DBE Program.** As a recipient of USDOT funds, ITD is required to implement the Federal DBE Program, and to narrowly tailor its implementation given factors affecting the Idaho transportation construction and engineering marketplace. The current Federal DBE Program provides regulations that state and local governments must follow. ITD must:

- Set an overall annual goal for DBE participation in ITD’s federally-funded contracts;
- Examine whether or not the annual DBE goal can be attained solely through neutral measures or whether race- or gender-based measures are needed;
- Choose the measures it will apply in an attempt to meet the annual DBE goal; and
- Identify the specific race, ethnic and gender groups that will be eligible for any race- or gender-conscious measures such as contract goals.

**Overall annual DBE goal.** Even though the Federal DBE Program outlined in 49 CFR Part 26 includes an overall 10 percent aspirational goal for DBE participation across the nation, state and local governments receiving USDOT funds must set an annual DBE goal specific to conditions in their relevant marketplace. The Federal DBE Program requires an agency such as ITD to set an annual DBE goal whether or not its program utilizes race- or gender-conscious measures such as DBE contract goals, or just race- and gender-neutral measures.

**Measures required to attempt to meet the goal.** The Federal DBE Program requires state and local governments to assess how much of the annual DBE goal can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts such as DBE contract goals. The state or local government must then select specific measures it will use in implementing the Program.

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<sup>1</sup> 515 U.S. 200 (1995).

<sup>2</sup> 488 U.S. 469 (1989).

**Western States decision.** The 2005 Ninth Circuit decision in *Western States Paving Co. v. Washington State DOT* sets requirements that ITD must follow in implementing the Federal DBE Program.<sup>3</sup> In this decision, the court held that state and local governments are responsible for determining whether or not there is discrimination in the local transportation contracting industry, and for developing narrowly tailored measures if a need exists, in order to comply with the Federal DBE Program. The court found that sufficient evidence of discrimination exists nationwide to hold that the Federal DBE Program was constitutional. The court also held that narrow tailoring of the program depends on each state or local government evaluating conditions within its own contracting markets.

Accordingly, the USDOT has advised state and local agencies that any use of race- or gender-conscious remedies as part of its DBE program must be based on evidence the recipient has concerning discrimination affecting the local transportation contracting industry<sup>4</sup>:

- The state or local agency determines whether or not there is evidence of discrimination in its transportation contracting industry.
- The USDOT recommends the use of disparity studies to examine whether or not there is evidence of discrimination, and how remedies might be narrowly tailored.
- The USDOT suggests consideration of both statistical and anecdotal evidence. “Disparity analysis,” or comparisons of DBE utilization with the relative availability of DBEs to perform the work, is an important part of the statistical information.
- Evidence must be considered for individual race, ethnic and gender groups.

This Disparity Study provides information to ITD on whether or not there is evidence of discrimination affecting the local transportation contracting industry, which groups are affected, and the need for specific program elements.

## **Study Team**

The study team for the Availability and Disparity Study is:

- BBC Research & Consulting, a Denver-based economic and policy research firm (prime consultant);
- Holland & Knight LLP, a national law firm;
- Galena Consulting, a Boise-based research firm; and
- Customer Research International, a telephone survey firm in San Marcos, Texas.

BBC Research & Consulting has overall responsibility for this study and performed most of the required quantitative analyses. Holland & Knight conducted the legal analysis that provides the basis for this study. Holland & Knight also performed in-depth personal interviews of business owners.

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<sup>3</sup> *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005)

<sup>4</sup> Questions and Answers Concerning Response to *Western States Paving Company v. Washington State Department of Transportation* [hereinafter DOT Guidance], available at [http://www.fhwa.dot.gov/civilrights/dbe\\_memo\\_a5.htm](http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm). (January 2006).

Galena Consulting conducted a detailed review of ITD contracting practices. Customer Research International conducted telephone surveys with business managers and owners in the transportation contracting industry.

### **Organization of the Report**

BBC begins by providing information on availability of minority- and women-owned firms in the transportation contracting industry. Section II concludes with a suggested “base figure” for ITD’s goal for DBE participation for the next fiscal year.

ITD can consider “step 2” adjustments to the base figure. BBC analyzed a number of factors, some indicating a downward adjustment in the base figure and some suggesting an upward adjustment. Section III presents this information.

ITD must decide how much of its overall annual DBE goal can be met through neutral means and how much through race-conscious measures. Section IV compares past utilization of minority- and women-owned firms for work with DBE contract goals and utilization under an all race-neutral program.

BBC explores possible explanations for any overall disparities in the utilization of minority- and women-owned firms. Combining qualitative and quantitative information, BBC separately examines MBE/WBE opportunities as subcontractors on transportation construction projects (Section V) and as prime contractors on these projects (Section VI). Sections VII and VIII analyze similar information for transportation engineering subcontracts and prime contracts. Section IX presents BBC’s analysis of possible remedies as well as other actions ITD should take to successfully implement the Federal DBE Program. Section X summarizes overall study results.

Note that a number of appendices provide supporting information for the Final Report. ITD should review the detailed discussion of study methodology and results presented in the appendices as it considers future implementation of the Federal DBE Program.

This final report incorporates analysis of oral testimony and written comments received as part of public hearings held by ITD after publication of a preliminary disparity study report.